

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLANT

v.

SANDEN AND FERGUSON COMPANY, A MONTANA COR-
PORATION, APPELLEE

APPELLEE'S BRIEF


PAUL W. SMITH,
DAVID R. SMITH,
*Attorneys for Defendant
and Appellee.*

Filed., 1945.

FEB 15 1945

.....Clerk.

PAUL P. O'BRIEN,

 3 CLERK

TOPICAL INDEX

	Page
ARGUMENT	
Point I. Answer and Refutation to Question relative to Constitutionality of Emergency Price Control Act of 1942 and the Maximum Price Regulations as raised by Appellant....	6
Point II. Answer and Refutation of Appellant's Point II and Showing that Trial Court did not err in its Findings of Fact and Conclusions of law	9
Point III. The Trial Court's Findings of Fact Comply exactly with the Evidence.....	12
Point IV. The Judgment of the Court is substantiated by the findings of fact and conclusions of law should be affirmed.....	26
CASES	
Bowles Adm. vs. NuWay Laundry Co., 144 F. (2d) 741 at 747	9
Hecht Co. vs. Bowles, 321 U. S. 321	27
State ex rel O'Grady vs. District Court, 58 Mont. 695, 198 Pac. 1117	11
Statement of Facts Omitted by Appellant	1
Statute and Regulation	1

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

No. 10901

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLANT

v.

SANDEN AND FERGUSON COMPANY, A MONTANA COR-
PORATION, APPELLEE

APPELLEE'S BRIEF

PROVISIONS OF THE ACT AND REGULATIONS

To the Appellant's statement as to the Provisions of the Act and Regulations should be added Sub-Section (h) of Section 902 Tit. 50 app.—“The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry * * * *.”

STATEMENT OMITTED BY APPELLANT

Appellant's statement should be amended considerably because the Appellant left out the most important part of the case.

The General Maximum Price Regulation (7 F. R. 3153, 3330) was issued April 28, 1942. It became effective as to retailers on May 18, 1942. It required sellers to prepare on or before July 1, 1942, a base period statement containing all the kinds of commodities that were sold during March 1942, together with their highest prices during that month.

This regulation became effective almost two months after March had gone and the defendant did not keep any permanent records of what goods it had on its shelves in March 1942, or what qualities, widths, weights, colors, sizes, finishes or textures of goods that were sold during March 1942. It had no records with which it could identify the goods which were sold in March 1942, with the names of manufacturers or lot numbers and had no records with which it could identify the goods which were on its shelves in May 1942, with manufacturer's or lot numbers and had no records with which it could identify the goods which it had on its shelves in May 1942, with goods which were sold in March 1942, with respect to manufacturers, lot numbers, qualities, widths, weights, colors, finishes or textures.

In January and February of 1943, when defendant made its Base Period Statement and its Cost of Living Commodity Statement it still could not identify the goods and that was the reason it could not do what the regulation required.

The evidence shows without contradiction that the defendant did not operate or maintain a per-

manent inventory system (R. 205). That it used the cost system. That it made only a categorical list of goods of prices and cost price when it took inventory at the first of the year. That it did not keep a record of the lot numbers, a description of the goods and the name of the manufacturer (R. 205). That that has always been its system (R. 205). That they had been in business since 1885 (R. 107). The defendant was maintaining the same records it always had (R. 221).

Plaintiff's own case by his own witness shows (R. 116) that it was impossible for the defendant to give lot numbers and describe the merchandise because the goods did not have lot numbers (R. 116). Plaintiff's own case by his own witness shows that effort was made (R. 116) to secure lot numbers but it was impossible to find further information (R. 116).

That to prepare the Base Period Statement the defendant was required to get lot numbers and secure the names of manufacturers and describe the article and show the retail price (R. 205) for March 1942, and the defendant's inventory did not show this.

That to prepare the Cost of Living Commodity List of prices the defendant was required to get the lot numbers and secure the names of manufacturers and describe the article (R. 205) and the defendant's inventory did not show this information.

Mr. Sanden testified they tried to do the best they could (R. 202). He and his sister went to the O. P. A.

Office and explained their predicament (R. 202, 210) and were told that it would be all right to prepare the list by taking the merchandise that was in the store at the time. (R. 202). He instructed his help to do the best they could (R. 208) but because of the fact that they did not have a permanent inventory system there was no name or lot number on the bolts, simply the cost and selling price and unless the person taking the inventory for the purpose of the base statement and cost of living commodity price list could identify the goods through memory he could not describe the goods on the statements (R. 208).

Mr. Sanden testified (R. 201) that some of his employees quit. Consequently with his old employees quitting and with no permanent inventory he was in a desperate situation (R. 201) where the lists had to be made from memory (R. 208).

As to whether or not the maximum prices were posted in the store Mr. Sanden testified that everything in the store was marked in plain figures (R. 215).

As to whether prices were raised Mr. Sanden testified that there were no markups at all (R. 215) the original tickets were on all articles just as they came in (R. 216). This evidence was corroborated by Lydia Clark (R. 187) who stated that there were no markups at any time.

When goods were sold by the clerks the sales slip was marked with the general name of the goods and price. There was no description of the goods on the

sales slips as to quality, width, texture, finish, color or weight (R. 135). A price of yardage did not have anything on it by which to identify it (R. 217) and because they had no permanent inventory, they had no record with which it could be identified.

The plaintiff introduced sales slips representing sales in March of 1942 and sales slips representing sales of goods during the year 1943 and compared the prices of the different articles but the goods sold in March, 1942, and the goods sold in March, 1943, or any time during 1943, could not be identified as the same goods as to quality, width, finish, color, or weight (R. 160) and neither could the goods sold be identified with the goods listed on the Base Period Statement or the Cost of Living Commodity List (R. 160).

The evidence shows that the different prices on the sales slips show that they represent different classes, weights, widths, and qualities, and finishes, and textures (R. 189).

The record shows without contradiction that immediately after the defendant received the warning notice (R. 119) which was on or about January 16, 1943, the defendant prepared and filed a Cost of Living Commodity Statement in February, 1943, (R. 109 Plaintiff's Exhibit No. 1) and at the same time made its base period statement (R. 110 Plaintiff's Exhibit No. 2) and that every effort was made to get the information required (R. 116).

The record shows that the requirement to file supplements to the cost-of-living commodity statement

was abolished by the plaintiff by Amendment No. 11 (7 F. R. 5192) before this case was filed.

The record shows that the plaintiff absolutely utterly failed to prove its case as he did not prove a single price was raised.

ARGUMENT.

POINT I.

In Point I of Plaintiff's Brief, Plaintiff argues that the Court raises the question as to the Constitutionality of the "Emergency Price Control Act of 1942, and the Maximum Price Regulation by its finding of fact No. 23, R. 78-79.

There is absolutely no merit to this argument of the plaintiff whatsoever. The trial Court found that, "If the Defendant were compelled by the Plaintiff to furnish in its base period statement and cost-of-living commodity statement all of the information required by the said General Maximum Price Regulation, the Defendant would have to change its business practices, cost practices and methods by installing a permanent inventory system, etc."

This finding of the Court is in conformity with the Emergency Price Control Act 50 U. S. C. App. Sec. 902 Sub Sec. "h", "The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods." This finding does not question the constitutionality of the act in any respect.

The finding is also in conformity with the General Maximum Price Regulation Section 1499.11

(b) "Prepare on or before July 1, 1942, on the basis of *all available information and records.*"

The finding is also in conformity with the evidence. The evidence shows without contradiction that the defendant had no records from which the base period statement could be made. The evidence shows that the defendant did not operate or maintain a permanent inventory system (R. 205). That it used the cost system. That it made only a categorical list of goods of prices and cost price when it took inventory at the first of the year. That it did not keep a record of the lot numbers, a description of the goods and the name of the manufacturer (R. 205). That that has always been its system (R. 205). That they had been in business since 1885, (R. 107) and were maintaining the same records it always had (R. 221).

Plaintiff's own case in chief, by his own witness, shows (R. 116) that it was impossible for defendant to give lot numbers and describe the merchandise because the goods did not have lot numbers (R. 116); that effort was made (R. 116) to secure lot numbers but it was impossible to find further information.

That to install a permanent inventory system it would cost \$2000.00 and would take two people full time at a cost of \$150 a month apiece to keep the permanent inventory going (R. 206). With this additional cost, it would be a question of whether they could keep going.

Then after the permanent inventory were installed, they could not give the prices and descrip-

tions of goods as of March of 1942, because the defendant had no records that this information could be taken from.

The plaintiff argued in part 2 of Point I that the Court questioned the validity of the regulation. There is absolutely no merit or foundation in this argument. The Court found exactly what the regulation required that the Base Period Statement was to be made up from the available records.

In Finding 18 (R. 77) the Court found that "Due to the fact that the Defendant had operated on a cost basis for over fifty years and not on a permanent inventory cash basis as aforesaid, the Defendant did not have some of the information required by said General Maximum Price Regulation such as lot numbers, names of manufacturers, descriptions of merchandise, and identification of merchandise * * * and for that reason and that reason alone, such information was not set out in said base period statement and said cost-of-living commodity statement." This finding is exactly according to the uncontradicted evidence as stated above.

Then in Finding 23 (R. 78-79) the Court found "If the defendant were compelled by the Plaintiff to furnish in its base period statement and cost-of-living commodity statement all of the information required by the said General Maximum Price Regulation, the Defendant would have to change its business practices, cost practices and methods by installing a permanent inventory system which would cost at least \$2000.00 and require the Defendant to

employ two additional bookkeepers and compel the Defendant to close its place of business.”

This is a finding of fact. The plaintiff tries to argue that the cost of \$2000 was the reason the defendant gave for not having adequate books and records and cites cases on hardship. (Plaintiff's Brief 23), but that is not according to the facts. The facts show that the price regulation went into effect after March of 1942 had already passed and the defendant did not have the records to show what merchandise it had on its shelves in March of 1942, and even though it would change its system which neither the law nor the regulations required and which would cost \$2000, still it would not have the information required by the Maximum Price Regulation. The defendant had been doing business this way for over 50 years.

POINT II.

REFUTATION OF PLAINTIFF'S POINT II.

The Trial Court did not err in its Findings of Fact and Conclusions of Law (R. 66-95).

Bowles Adm. vs. Nu Way Laundry Co., 144 F. 2d 741 at 747—“The test is * * * whether the said purchasers were paying the same prices for the same services during the base period.”

The test in this case at bar then is whether the purchasers in 1943, were paying the same prices for the same articles as they did during March, 1942.

The burden would then be on the plaintiff to prove that the defendant charged more for goods

in 1943, than it did for the same article in March of 1942.

According to this test the plaintiff absolutely failed to prove his case.

The plaintiff argues in his Point II, on pages 27 and 28 of his brief that the only reasons the defendant did not file its base period statement showing the highest prices which it charged for all kinds and qualities of merchandise sold and delivered or offered for sale in March 1942, and its cost-of-living commodity statement before July 1, 1942, was because of shortage of help and the cost involved. Of course there was evidence and it was uncontradicted that its help was quitting and changing (R. 201) all the time. This, however, was not the main reason but it was important because due to the fact the defendant was not on a permanent inventory system, the only way lot numbers and names of manufacturers could be put in the Base Period Statement was that it had to be done by memory of the employees (R. 208) and the old employees had quit.

The only evidence of cost was where Mr. Sanden testified that it would cost \$2000 to install a permanent inventory system, but defendant's argument that cost was no excuse means nothing because if they had installed a permanent inventory system after March 1942, they would not have had the information the Maximum Price Regulation required because the defendant had no records to start with.

In part 2 of Point II in plaintiff's brief the plain-

tiff argues that defendant failed to file current monthly supplements of cost-of-living commodity statements. This is a moot question and means nothing because the Plaintiff had abolished the regulation requiring the monthly supplements before they filed the action against the defendant. It was abolished July 6, 1943, and this action was not filed until July 13, 1943. Courts will not pass on moot questions—State ex rel, O'Grady vs. District Court, 58 Mont. 695, 198 Pac. 1117.

In part 3 of Point II in plaintiff's brief the plaintiff says, "The defendant either falsified the prices listed in the two statements, or omitted to list in the base period statement the kinds and qualities that were sold at prices appearing in its March 1942, sales slips.

This is not even argument. In other words the plaintiff says the defendant either did this or that. If the plaintiff does not know what defendant did, it is one thing certain he did not prove anything.

The plaintiff asks himself a question on page 32 of his brief, "How, then, can the explanation for the amounts in the sales slips be reconciled with the amounts stated in the base and cost-of-living commodity statements?"

The Plaintiff's own witness answered that question for him on page 160 of the Record. He testified he could not identify the articles listed in the statements with the sales slips. He could not tell to what particular lots they referred to and the different lots and particular kinds of goods had dif-

ferent prices and also he could not identify the goods by the sales slips.

Again on Page 186, plaintiff's witness testified she could not tell the kind and quality of the goods as indicated on the sales slips. On page 185, this witness testified that with regard to denim there were ten to fifteen or twenty ranges, different qualities represented by the sales slips. On page 187 she testified there were fifteen or twenty qualities of gingham.

At no place does the plaintiff show that there was a raise in price of a single commodity over the prices of March, 1942. At no place does the plaintiff identify the sale of a single article in 1943, with the same article as sold or offered for sale in March 1942. Nor does the plaintiff identify the sale of a single article with the same article on the base period statement.

The evidence shows that the sales slips did not identify the article sold with the quality, width, texture, kind, weight, finish, size or color and therefore the articles could not be identified.

The evidence shows uncontradicted that the defendant did not raise the price of a single article in its store (R. 215 and R. 187).

POINT III.

The Trial Court's Findings of Fact comply exactly with the evidence.

1. Findings of fact 1 to 14 inclusive (R. 66-75) consist of uncontroversial facts. They consist of

the allegation in the complaint, jurisdiction of the Court, and the Maximum Price Regulations.

2. In Finding number 15 (R. 75) the Court found and the evidence shows that on or about February 1, 1943, (R. 109) and subsequent to receipt by it of the warning notice (R. 119) the defendant prepared a base period statement on the basis of all available information and records (R. 110-113), showing: (1) The highest prices which it charged for such of those commodities as it delivered during March 1942, and its offering price for delivery of such commodities during such month together with an appropriate description and identification of each of such commodities insofar as the Defendant was able to do so. (R. 202) Mr. Sanden testified "Well, it was essential that we prepare it, we tried to do the best we could about it." Then (R. 203) "We tried our best to list everything."

3. In Finding 16 (R. 76) the Court found and the evidence shows that "Continuously for more than 50 years (R. 107 In business since 1885) the defendant had operated on a cost basis (R. 205) and therefore did not keep records of the names of manufacturers, lot numbers, descriptions of merchandise, or identification of merchandise as to lot numbers, manufacturers, textures, grades, and so forth (R. 205)." The evidence also shows (R. 221) that the defendant was maintaining the same records it always had. (R. 221)

4. In Finding 17 (R. 76) the Court found and the evidence shows that in January 1943, prior to the

defendant's making its base period statement, Eugene Sanden, Assistant Manager went to the O. P. A. Office in Helena and explained to two officials the difficulties he was having in connection with operating the store and his help problem and that he was unable to furnish some of the information called for by said General Maximum Price Regulation and then and there had the understanding that it would be all right for the defendant to prepare said statements by taking the merchandise that was in defendant's store at the time and pursuant to that understanding the defendant endeavored to list all the merchandise in said store and did so to the best of its ability (R. 202, 203)." This conference of Mr. Eugene Sanden and O. P. A. officials was corroborated by Mr. McDermott, an O. P. A. Official (R. 192).

5. In Finding 18 (R. 77) the Court found and the evidence shows that due to the fact that the defendant had operated on a cost basis for over fifty years and not a permanent inventory cash basis, the defendant did not have some of the information required by said General Maximum Price Regulation such as lot numbers, names of manufacturers, descriptions of merchandise, and identification of merchandise which had previously been explained to said O. P. A. Officials and for that reason and that reason alone such information was not set out in said base period statement and said cost-of-living commodity statement. (R. 205 Testimony of Eugene Sanden).

6. In Finding 19 (R. 77) the Court found and the evidence shows that in February 1943, when said Base Period Statement and said cost-of-living commodity statement were prepared the defendant handled and had in its store for sale approximately 4000 different items of merchandise (R. 204), there was not then as much merchandise in the store as there was in March, 1942 (R. 204); and, new merchandise had come into said store which had replaced a great deal of the merchandise which had been in said store in March 1942, (R. 216 and 219).

7. In Finding 20 (R. 77) the Court found and the evidence shows that the merchandise which had come into said store subsequent to March 1942, and which had replaced a great deal of the merchandise which was in said store in March 1942, was of a different quality, grade, width, color, design and kind (R. 219).

8. In Finding 21 (R. 78) the Court found and the evidence shows that because of the fact that the defendant operated on a cost basis and not on a permanent inventory basis the sales slips of merchandise sold by it as indicated by exhibits introduced in evidence during the trial of this case were not marked with lot numbers, grades, width, and so forth, and as a result it was and is impossible to determine from said sales slips, or any of them, the quality, grade, width, color, design, or kind for the purpose of comparing sales prices shown on such sales slips and prices shown on said base period statement and cost-of-living commodity statement.

(R. 218) Eugene Sanden testified: Q. "Could you tell by looking at a slip that represented a sale in 1943, as of March and February and tell whether or not that is the same article that was in the store as of March 1942?" A. "No, we couldn't, could tell nothing from them sales slips, absolutely nothing."

Donald I. Creel, a witness for the plaintiff, testified the same that you could tell nothing from the sales slips or from the statements as to the grade, quality, weight and sizes (R. 160).

9. In Finding 22 (R. 78) the Court found and the evidence shows that to require that the Defendant mark sales slips of merchandise sold by it in its said store with lot numbers, grades, widths, and so forth on the quality, grade, width, color, design or kind for the purpose of comparing sales prices shown on sales slips and prices shown on its base period statement and cost of living commodity statement would be in operation and effect to use the powers granted in Section 2 of the Emergency Price Control Act of 1942, to be used and made to operate to compel changes in its business practices, cost practices and methods contrary to law. This is in conformity with the evidence as the evidence shows that the defendant had been on the cost system for over 50 years and if it were compelled to put in a permanent inventory system it would have to change its entire system of doing business. (R. 205)

10. In Finding 23 (R. 78) the Court found and the evidence shows if the defendant were compelled by plaintiff to furnish in its base period statement

and cost-of-living commodity statement, all the information required by the said General Maximum Price Regulation, the defendant would have to change its business practices and cost practices and methods by installing a permanent inventory system. This is clearly shown by the testimony of Eugene Sanden (R. 205).

11. In Finding 24 (R. 79) the Court found and the evidence shows that the base period statement and cost-of-living commodity statement hereinbefore referred to were carefully made by the Defendant in honest effort to meet the requirements of said General Maximum Price Regulation. (R. 208) Mr. Sanden testified, Q. "Mr. Sanden, you have been charged that the descriptions of the articles listed were indefinite, uncertain and confusing, and that it was impossible to determine what articles were priced, or the prices thereof. Explain to the Court that situation." A. "Well, it comes back to the point I have already tried to make; that we were operating under difficulties and those that were taking the inventory, the help taking the inventory, were instructed to do the best they could. Now in many of these instances here relative to these pieces of yard goods, because of the fact that we do not have a permanent inventory system, there is no name or no lot number often times on these bolts, simply the cost and selling price, so unless the person taking the inventory for the purpose of these price lists, cost of living commodity price list, could identify the goods sufficiently to show who the manufactur-

er was through memory or knowledge, why they simply had to give up; just do the best they could; that was the best that was possible under the circumstances."

(R. 209) Q. Is that the reason for the numbers being left off of the inventory?

A. That is correct.

Q. That is of this listing?

A. That is correct.

Q. The Court, as I understood it, there wasn't any bolt number to put in the list?

A. There wasn't; if there had been it would have been in the list.

Q. Mr. Sanden, you have been charged in the complaint that the statement did not contain an appropriate description or identification of the many commodities listed. That pertains to an appropriate description or identification?

A. Well, it goes back to the same thing again. We were unable to do it in some instances. Generally speaking I think we did in the large percentage of cases, but there were exceptions where we couldn't identify them, but it was not through any intent to not identify; it was simply a failure—

12. In Finding 25 (R. 79) the Court found and the evidence shows that a few sales slips were introduced in evidence during the trial of this case which indicate that the defendant sold in its store in March 1943 merchandise such as Black Bear heavy duck overalls which cost Defendant \$33.00 a dozen in Seattle for the regular sizes, and \$36.30 a dozen

for the extra sizes, all of which the Defendant sold below cost had not been listed on said cost-of-living commodity statement, but in each case the failure to list said merchandise was an error or an oversight and entirely without any intent to violate any provision of said General Maximum Price Regulation. (R. 202 and 203) Mr. Sanden testified, "I overlooked a carpenter's overall, Black Bear heavy white duck overall, manufactured by the Black Bear Company in Seattle, and I think we had a few pairs on hand under the shelf somewhere I overlooked in the rush. I made that mistake. I have the invoice right here now of the overalls; we sold them for \$3.00 apiece. I overlooked this one item here, and the overall cost us \$33.00 a dozen in Seattle for the regular sizes, and \$36.30 a dozen in Seattle for the extra sizes, and we sold them here in Helena for \$3.00 a pair. Now I don't think anybody has been injured there."

13. In Finding No. 26 (R. 79) the Court found and the evidence shows that at no time did the Defendant mark up any price on merchandise contained in its said store in March, 1942, and the original tickets showing the price at which such merchandise was offered for sale and would be delivered in March 1942, is and at all times has been plainly marked on the commodity itself; (R. 215) Mr. Sanden testified. "There have been no markups at all; there have been no markups in prices. It may be that new goods have come in and taken on those new prices but there have been no markups of the old goods in the house at that time. You go down

to the store today and you will find the original tickets on things that have been there a couple years and the prices are the same.”

“As these new things come in a sale may be made from this.—a dozen sales, twenty sales,—the prices will vary, likely because of different goods, different quality, different texture and widths, and so forth, from goods that have been on hand prior to them.

(R. 215) Mr. Sanden testified, Q. You have been charged in the Complaint that you failed to post or display a maximum price. Is that true?

A. That isn’t true at all. Everything is marked in plain figures; a bolt of goods has the price marked on the end of the bolt, a suit of clothes has a ticket on the suit, a lady’s hat has the ticket on the hat, so that is absolutely an untrue allegation.”

14. In Findings 27 to 39 inclusive (R. 80-93) Court found the facts relative to the sales of the defferent articles such as Gingham, Denim, Challis, Spun Rayon, Indian Head, Burlap, Eylette, Ticking, Percale, Gaberdine, Jersey, Overalls, Sateen. These findings are all substantiated by the evidence.

Take for example Gingham.

“The Court found in finding 27 (R. 80) Gingham was referred to in the cost-of-living commodity statement, “To February 1, 1943.” Plaintiff’s exhibit No. 1.

Article	Style	Number	Manuf.	Description	Price
Gingham	Golden Rod	Carson			.39

“It appears from Plaintiff’s Exhibit No. 5 introduced in evidence during the trial of this case, that in March, 1942, Defendant made six sales of gingham, a yard goods, three at 35c per yard, and three at 29c per yard; but, it is not shown that these were the only sales of gingham made by the Defendant in that month;”

“It appears from Plaintiff’s Exhibit No. 6, introduced in evidence during the trial of this case, that in February, 1943, Defendant made three sales of gingham, a yard goods, at 39c per yard;”

“It appears from Plaintiff’s Exhibit No. 25, introduced in evidence during the trial of this case, that in February, 1943, the Defendant received a shipment of gingham from “Butler Bros., Minneapolis, Minnesota;”

“It is not shown that the gingham referred to in said cost-of-living commodity statement and the gingham so sold and delivered by the Defendant in March, 1942, and February, 1943, or any of them, referred to the same or similar articles or would give the purchaser fairly equivalent serviceability or belonged to a type which would ordinarily sell in the same price line; (see Plaintiff’s Exhibit No. 4 pp. 8 and 9) and

“It is shown that there are fifteen or twenty different qualities of gingham, that none of the March, 1942, sales slips show the quality, width, or color of the gingham sold; and that the gingham sold by the Defendant in March, 1942, (Plaintiff’s Exhibit

No. 5) and February, 1943, (Plaintiff's Exhibit No. 6) were not of the same quality."

The Court gives the transcript pages where the evidence is found in its findings.

See Record 138 where Plaintiff's Exhibit No. 5 was introduced into evidence.

See Record 140 where Plaintiff's Exhibit No. 6 was introduced into evidence.

See Record 164 where Plaintiff's Exhibit No. 25 was introduced.

See Record 222 where Plaintiff's Exhibit No. 4 was introduced entitled "What Every Retailer Should Know About the General Maximum Price Regulation.

When Plaintiff's Exhibits No. 5 and No. 6 were introduced there was no showing that these were the only sales of gingham made by the Defendant in March, 1942, and there is no such showing in any other part of the record.

There is also no showing by the plaintiff that the gingham referred to in said cost-of-living commodity statement and the gingham so sold and delivered by the Defendant in March, 1942, and February, 1943, or any of them referred to the same or similar articles or would give the purchaser fairly equivalent serviceability or belonged to a type which would ordinarily sell in the same price line. But the evidence does show that there are fifteen or twenty different qualities of gingham (R. 189), that none of the March, 1942, sales slips show the quality, width, or color of the gingham sold. (R. 179) Miss Lydia Clark called as plaintiff's witness testified:

Q. I direct your attention to Plaintiff's Exhibit

No. 5 and ask you to check through each one of those sales slips and tell us what they evidence the sale of?

A. Those are different qualities of gingham.

Q. I direct your attention to Plaintiff's Exhibit No. 6 with reference to the word "gin." What is that?

A. That's gingham.

Q. I will ask you to check through each one of the sales slips making up that exhibit and tell us what they represent only with regard to gingham?

A. Well, would be different qualities of gingham which is a yard goods.

(R. 191). Q. And the only way you can identify the quality and class of goods by the slips is by the price.

A. Yes.

Q. And the price might be different at different times in the store?

A. Yes.

Q. And each one of these classes of goods have a different classification? They have a different price range, quality, weights, widths, and so forth?

A. Yes, sir.

(R. 160) Mr. Donald I. Creel testified as plaintiff's witness:

Q. Referring to those various exhibits which have been introduced in evidence here as being also the slips of Sanden and Ferguson Company, covering the period of 1942 and 1943, there is no relation, is there, between the slips of 1942 and 1943 with relation to the goods listed except that it was a partic-

ular kind of goods listed at a certain price? Isn't that true?

A. That is all it shows on the slip, yes, sir.

(R. 218) Mr. Sanden testified:

Q. Could you tell by looking at a slip that represented a sale in 1943, as of March and February and tell whether or not that is the same article that was in the store as of March, 1942?

A. No. We couldn't, could tell nothing from them sales slips, absolutely nothing.

The record shows without contradiction that the evidence substantiates each of the Courts findings 27 to 39 just as it did with reference to gingham. Defendant does not think it necessary to repeat for each article.

Take plaintiff's argument with reference to gingham on pages 34 and 35 of Plaintiff's brief. He makes no showing whatsoever where the Trial Court erred in its finding with reference to gingham. He shows no evidence to substantiate this abstract contention that the defendant was in violation of anything.

The same condition applies to each of the articles, denim (Plaintiff's Brief 35), Challis (Plaintiff's Brief 37), Gaberdine (Plaintiff's Brief 38), Indian Head (Plaintiff's Brief 39), Percale (Plaintiff's Brief 40), Burlap (Plaintiff's Brief 41) Ticking (Plaintiff's Brief 42); Spun Rayon (Plaintiff's Brief 43), Jersey (Plaintiff's Brief 44), Overalls (Plaintiff's Brief 44), Sateen and Eylette (Plaintiff's Brief 45).

15. In Finding 40 (R. 93) the Court found and the evidence shows that the defendant at all times displayed its ceiling prices for all cost-of-living commodities carried in its store on or near the merchandise and easily visible to customers. (R. 215) Mr. Sanden testified, Q. You have been charged in the Complaint that you failed to post or display a maximum price. Is that true? A. That isn't true at all. Everything is marked in plain figures; a bolt of goods has the price marked in the end of the bolt. A suit of clothes has a ticket on the suit. A lady's hat has the ticket in the hat, so that is absolutely an untrue allegation."

At no place in plaintiff's brief does the plaintiff show where the trial Court erred in the findings of fact of the Court.

On page 55 of Plaintiff's Brief the plaintiff states that under Section 1499.2 of the Regulations, if a dealer is unable to price an article not previously handled, according to a similar commodity which he had handled, he must charge the highest prices of a most closely competitive seller.

The plaintiff offered no evidence that the defendant was selling any commodities at higher prices than his competitors. There is no allegation in the complaint that he was selling commodities at higher prices than his competitors.

There was evidence that defendant had no records to show the quality, grade, texture, finish, etc., of commodities it had sold.

There was no evidence introduced by plaintiff

and no allegation to the effect that defendant was unable to price an article not previously handled by it.

The plaintiff also states on page 55 of his brief "The Court also offered no explanation why in some instances, like gaberdine, the merchandise was sold or offered for sale at a price even in excess of that set forth in the cost-of-living commodity statement, or why in some instances, like canvas, the merchandise was not listed in the cost-of-living commodity statement at all."

It was not the duty of the Court to offer an explanation of anything. The Court made findings of fact as it found the facts.

The trouble is the plaintiff was the one who did not offer an explanation or offer any evidence that would explain it.

The defendant proved by evidence introduced that the difference in prices was due to different widths, qualities, textures, colors, finishes, etc. The defendant proved by evidence and the Court found that in some instances where commodities were left out of the statement, it was by error and not by intention and that it had to list the articles which were on the shelves at the time the list was made when it did not have it in stock at that time. That it had no permanent inventory it could get the information asked for.

POINT IV.

The Judgment of the Court is substantiated by the

findings of fact and conclusions of law and should be affirmed.

The evidence showed and the court found that the defendant has at all times endeavored in good faith to comply with and abide by the provisions of the Emergency Price Control Act of 1942 and with each and all of the rules and regulations issued thereunder and intends to and will continue to do so at all times in the future.

The Court found, finding 42 (R. 94), that it is not shown that the Defendant ever at any time or at all engaged, or that it is about to engage, in any act or practice contrary to the provisions of the Emergency Price Control Act of 1942, or any rule or regulation issued thereunder, including said General Maximum Price Regulation or any regulation supplemental thereto or amendatory thereof.

The evidence of Eugene Sanden as shown herein still stands uncontradicted that he endeavored to do the best he could and at no time did the defendant mark up the prices of merchandise it had or offered for sale March of 1942, or at any other time.

The case at bar comes clearly within the rules of law decided in the case of *Hecht Co. vs. Bowles*, 321 U. S. 321. The plaintiff says in his brief "In the *Hecht Case*, the absolute good faith of the defendant was unquestioned." (Plaintiff's Brief 62). The same thing applies to this case; no evidence was offered to the contrary.

On page 60 of Plaintiff's brief the plaintiff states, "It is true that whether an injunction should issue in

any case rests in the sound discretion of the Court.” That is what the Hecht case held. Surely in the case at bar where the plaintiff failed to show where the Court erred in its findings of fact, the Court had the right to dismiss the case and the Judgment should be affirmed.

Respectfully submitted,

PAUL W. SMITH,

DAVID R. SMITH,

*Attorneys for Defendant
and Appellee.*